BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NATHAN A. SMALLEY (DECEASED)	)	
Claimant	)	
V.	)	
	)	
SKYY DRILLING	)	Docket No. 1,059,872
Respondent	)	
AND	)	
	)	
BITUMINOUS FIRE & MARINE	)	
INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent requests review of Administrative Law Judge Brad E. Avery's January 28, 2014 Award. Claimant sustained injuries in a motor vehicle accident on December 3, 2011 and died on December 15, 2011. The Board heard oral argument on May 6, 2014.

APPEARANCES

The surviving spouse, Bobbie Cree Myers, appeared by her attorney, Joseph Seiwert. The surviving minor child, Harmony C. Smalley, appeared by her attorney, Larry Wall. The respondent and insurance carrier (respondent) appeared by their attorney, Dallas L. Rakestraw. All attorneys practice out of Wichita.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, respondent stated it was not asserting any defenses under K.S.A. 2011 Supp. 44-501, such as those involving consumption of drugs, horseplay, willful failure to use a guard or protection or violation of a safety rule or regulation.

ISSUES

The Award found claimant's accident arose out of and in the course of his employment and his accident was the prevailing factor in causing his death. Respondent requests the Board reverse the Award, arguing claimant's death would not have occurred but for the firing of a rifle in the vehicle, which injured the driver and caused the vehicle to leave the roadway and crash into a tree. Respondent also contends the going and coming rule precludes compensation. Claimant requests the Award be affirmed.

The issue for the Board's review is: Did claimant's accidental death arise out of and in the course of his employment, including:

A. Does the going and coming rule bar compensability?

B. Does the Board have jurisdiction to determine if claimant's death arose either directly or indirectly from idiopathic causes?

C. Was claimant's accidental death the result of a personal or neutral risk?

D. Was there a causal connection between the conditions under which the work was required to be performed and the resulting accident?

E. Was claimant's accident the prevailing factor in causing his injury, medical condition or disability?

FINDINGS OF FACT

Respondent drills oil and gas wells in Kansas. Trevor Smalley (Trevor), claimant's brother, ran a drilling rig for respondent and normally supervised a crew of three employees. Claimant was a chain hand or field hand on Trevor's crew. Trevor was claimant's supervisor. Claimant lived in El Dorado, with Bobbie Cree Myers, his common law wife, and their daughter, Harmony Smalley. Every workday, claimant would drive his personal vehicle to Eureka, and then ride with Trevor to the well site.

Ben Harrell is a field supervisor for respondent. He testified that as part of the employment agreement, Trevor was responsible to transport his crew to and from well sites and employees are advised, as is industry custom, that the driller to which they are assigned will transport them back and forth to work.[1] Mr. Harrell testified this arrangement benefitted respondent and allowed it to have trustworthy employees that are able to travel to different rigs.[2]

Trevor's driving record made it prohibitive for respondent to insure him, so he and his crew traveled in his 1996 Jeep Grand Cherokee Laredo. No crew member received an hourly wage until they began work at the well site. Only Trevor was paid mileage at the rate of 52¢ or 53¢ per mile. Workers that stayed overnight at job sites over 100 miles from Eureka would have their lodging paid and receive a per diem. While respondent has a Eureka office, the Smalley brothers never worked there. Respondent also has a shop in Virgil, but the Smalley brothers would only be there if there was no drilling to be done.

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[1] Harrell Depo. at 40-41; see also pp. 12, 22, 33.

[2] *Id.* at 28-30, 40.

Mr. Harrell offered overtime to the Smalley brothers to work laying pipe at a shorthanded well site, Rig 5, which was about 40-45 miles northeast of Eureka. The Smalley brothers accepted, and on Saturday, December 3, 2011, Trevor drove claimant in his Jeep toward the work site. Mr. Harrell testified he would have used a different route, but Trevor was familiar with the well site location and could choose which route to take. Trevor was not transporting any tools or equipment belonging to respondent.

Around 12:03 p.m, on December 3, 2011, Marion Williams, a deputy sheriff for Woodson County, received notification of a motor vehicle accident 0.8 miles north of Grouse Rd. on 180th Rd., a two-lane gravel road that is straight on a grade or slope. He arrived at the scene at 12:26 p.m.[3] Deputy Williams observed a Jeep smashed into a tree. Both air bags had deployed. He noticed claimant's head lying on the passenger windowsill with his body stuck between the dash and passenger seat. He attempted to communicate with claimant, but claimant could only moan. His accident report noted surface conditions were wet and adverse weather conditions included rain, mist and drizzle.[4] Rain, although falling, was not heavy. Deputy Williams made an impromptu tent-like cover over claimant's face "so he wouldn't get any more rain down his throat or his nose and possibly drown."[5] He noted the driver, Trevor, was incoherent and his left femur protruded through his thigh.

Emergency personnel arrived and removed the Smalley brothers from the Jeep. Claimant was transported to Stormont-Vail Hospital in Topeka. Trevor was taken to Via Christi St. Francis in Wichita, where he was diagnosed with eleven broken ribs, a gunshot wound to the left leg, a broken femur and head injuries.

Deputy Williams inspected the vehicle and found a rifle;[6] its barrel had penetrated about six inches into the dash. The rifle barrel had not gone into a crease in the dash. Rather, the rifle was wedged between the dash and the passenger side bucket seat, "[l]ike you shoved it into the dash."[7] Deputy Williams removed the rifle and discovered it had been discharged. Emergency personnel found a bullet hole in the driver's side door. Marijuana and drug paraphernalia were also found on claimant and in the Jeep.

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[3] While Deputy Williams' report listed the time of accident as 12:03 p.m., the actual time of the accident is unknown.

[4] See McKinzie Depo. Ex. 3 (2993 Woodson Cnty Sheriff's Rpt.PDF). McKinzie Depo. Ex. 3 is a CD or DVD that arrived at the Department of Labor in a broken and cracked jewel case held together by a metal binder clip. The Board has placed such exhibit in a padded envelope to prevent further damage.

[5] Williams Depo. at 8.

[6] The rifle is a Remington Model 700, which fires a .270 Winchester round. Despite varying testimony, the rifle is not a Remington 270 or a Winchester rifle. The rifle is 44½" long.

[7] Williams Depo. at 13.

Deputy Williams found no brake marks or skid marks at the accident scene. He concluded Trevor had not attempted evasive maneuvers. He acknowledged other vehicles traveling by the accident could have obscured some of the evidence on the roadway. Based upon vehicle damage, he believed the Jeep hit the tree at a high rate of speed.

Deputy Williams performed additional investigation of the Jeep on December 4, 2011. He inserted a four-to-five foot long rod through the bullet hole. From the driver side door, the rod went at an upward angle toward the passenger seat. Deputy Williams' report stated, "The path of the bullet could only substanciate [sic] the fact that Nathan had the gun on his lap and [while] driving down the road the gun went off, shooting Trevor in the leg."[8] Deputy Williams testified Trevor drove directly into the tree at a high rate of speed without slowing down with "no skid marks or brake marks, just a clear straight path to the tree."[9] He believed the Jeep was moving at a high speed based on vehicle damage.

Deputy Williams also testified, "The driver was shot in the left femur. At the high rate of speed that he was traveling, he turned towards the pain, therefore, losing control of the vehicle and into the tree."[10] Deputy Williams was unaware of any scientific studies or articles showing people turn toward the side of the body that is injured. His opinion was based on his training and experience. He investigated 30 or more motor vehicle accidents, none of which involved gunshot wounds. The instant case was the only situation where he determined a driver turned toward the side of the body that was injured.

The rifle was not tested for fingerprints. Deputy Williams could not tell if there was any input on the rifle trigger, of if claimant or the jarring of the collision may have set if off. The rifle was not tested to determine if it misfired. No bullets were found in the Jeep.

Based on the Board's evaluation of accident scene photographs, after leaving the road, the Jeep entered a small ditch or area lower than the roadway,[11] before coming up out of the ditch and striking the tree.[12] The front passenger side tire had little, if any tread.[13] The front passenger seat was twisted to the right and down, and the Jeep frame was bent and the transfer case was broken.[14]

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[8] *Id.*, Ex. 3 at 3.

[9] *Id.*

[10] *Id.* at 18.

[11] See also McKinzie Depo. Ex. 3 (2993 Site Insp photographs DSC03610.jpg shows an indented, barren area between the road and the accident site; it appears to be a small ditch).

[12] See Williams Depo., Ex. 7 at 7.

[13] See *id.*, Ex. 7 at 21.

[14] See *id.*, Ex. 7 at 10, 20, 22 and 23.

J. B. Lockhart, a Kansas Highway Patrol trooper, took Trevor's statement on December 4, 2011. Trevor stated he was "[s]peeding and went off the road."[15] Trevor did not indicate he was shot and veered off the road. Upon further questioning, Trevor had no recollection of the rifle that was found in the vehicle nor the gunshot damage to the vehicle.

As a result of his injuries, claimant died on December 15, 2011.

Trevor gave a recorded statement to an insurance company representative on January 12, 2012.[16] The statement summary indicated Trevor could not recall the accident or preceding events and he did not know how the accident occurred. He speculated his Jeep may have blown a tire. Despite such lack of memory, Trevor indicated the rifle was laying on the back seat of the Jeep on the date of accident. He denied his brother was carrying the rifle in the front seat, noting claimant did not like guns and was not a hunter. He speculated that the rifle may have bounced forward from the backseat after the Jeep struck the tree. Trevor denied "road-hunting."

Trevor later testified he had no memory of events from two days before the accident until about two days before being released from the hospital. The record is unclear when he was released from the hospital. He believed he was carrying the rifle in his Jeep to have the scope "dialed in" at a friend's house after work. He testified his rifle was usually stored either "in the floor board of the back seat" or "on the back seat."[17] Trevor and claimant's wife testified claimant was not a hunter and had no reason to handle the rifle.

Approximately a couple months prior to the accident, Mr. Harrell observed the rifle in the front seat of Trevor's vehicle with the barrel pointed down toward the floor. Trevor told Mr. Harrell the rifle was loaded. At that time, Mr. Harrell told Trevor he was "not supposed to be having firearms on location and he should quit carrying it."[18]

Robert McKinzie, an accident reconstruction specialist, was retained by respondent. Mr. McKinzie has an associate's degree in criminal justice from Barton County Community College, but does not have an engineering, physics or science degree. He is accredited by the Accreditation Commission for Accident Reconstruction. Mr. McKinzie began working for the Kansas Highway Patrol in 1981. In 1990, he started McKinzie & Associates. In 1999, he left the Highway Patrol and began working full-time for his company. He primarily performs motor vehicle accident reconstruction work. Over the course of his career, he has worked on perhaps one-half dozen shooting reconstructions that are related to motor vehicle accident reconstruction cases.

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[15] Lockhart Depo. at 5-6; see also Lockhart Depo., Ex. 1.

[16] See McKinzie Depo. Ex. 3 (2993 Recorded Stmnt T. Smalley.PDF).

[17] Smalley Depo. at 59.

[18] Harrell Depo. at 38; see also p. 35.

Mr. McKinzie reviewed the accident report and photographs from the sheriff's office. He also conducted an on-site analysis at the accident scene. He indicated physical evidence produced as a result of the motor vehicle collision on a gravel roadway is very short-lived because the road surface moves as vehicles travel over it. Usually two or three vehicles, sometimes even the responding emergency vehicles, can deteriorate or obliterate physical evidence. Because the physical evidence had deteriorated, he had to rely on the police measurements that were taken during the investigation and utilize roadway geometry.

Mr. McKinzie opined the vehicle turned left and departed the roadway at about a 40° angle about 81'6" south of the tree, which was 24' west of the road. He estimated the speed of the vehicle to have been very close to between 31 and 34 miles per hour at impact with the tree. Mr. McKinzie testified the preferred method to determine vehicle speed at impact would be to examine the vehicle, which he did not do, rather than reviewing photographs, but he did not think such distinction made much difference. His report noted the vehicle speed would be slightly higher than 31-34 miles per hour.

Based on information from the National Oceanic and Atmospheric Administration, Mr. McKinzie believed it was not raining until after the accident.[19] His report noted 96% humidity at the Emporia Municipal Airport.[20] He concluded weather did not contribute to the accident.

Mr. McKinzie did not believe the entry and exit holes on the door represented a true trajectory of the bullet leaving the rifle because bullets change direction when they strike something, like Trevor's femur. Mr. McKinzie testified the actual bullet trajectory was not critical to any of his conclusions.

It was Mr. McKinzie's opinion, over objection, that the rifle fired before the Jeep impacted the tree. His opinion was based on what he viewed as a lack of evidence showing roadway geometry contributed to the crash, no known vehicle mechanical defect (such as loss of a tie rod), no weather conditions that deteriorated driver visibility or deteriorated the roadway surface, and no other known emergency roadway event would explain the accident.[21] However, Mr. McKinzie could not state whether there was some other emergency event. He acknowledged any emergency action taken by the driver would have been on a gravel road, and, if there had been evidence of emergency action, it would be understandably obliterated, in addition to the rain affecting the accident scene.

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[19] McKinzie Depo. at 15.

[20] See McKinzie Depo. Ex. 3 (2993 Weather 13989 EMP.jpg). There was 96% humidity at 12:13 p.m. and 100% humidity at 12:32 p.m. at the Emporia Municipal Airport. The accident site is closer to Yates Center than the Emporia Municipal Airport. Whether it was raining at the airport in Emporia is not determinative of rain at the accident site.

[21] *Id*. at 24-27, Ex. 2 at 13.

Mr. McKinzie believed the rifle fired before loss of vehicle control occurred:

> I don't think you can say that it went off during the loss of control. The reason is that - - remember those issues about laws of motion. The rifle, let's say it's laying in the back seat. When the vehicle starts to yaw,[22] whatever friction that object in the vehicle has with what it's resting on is the only thing keeping that object in place. So, as the vehicle yaws to the right, turning to the left, that object would continue in its direction until it is affected by some outside unbalanced force. And that's basically anything that it touches, so it would fall off the seat when it hit the back of the seats and then dropped to the floorboard.
>
> If, on the other hand, the rifle is in between the seats with possibly the butt in the air and probably is slightly higher than the barrel and it goes off, that same thing occurs. It has to have some force affected to it to change from the firing direction to the longitudinal direction other than the movement of the vehicle. That's not going to happen, because there's nothing about the movement of this vehicle, it changing direction in this 40-degree angle that's going to cause the rifle to rotate the opposite direction.
>
> Q. And what explanation is there for how the rifle could have been pointed forward at the time of impact?
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> A. Between the time that it was discharged and the time of the Jeep hitting the tree, someone changed its direction because the yaw of the vehicle is not going to do that.
>
> . . .
>
> [T]he rifle is in the back or in some form of moving from the back to the front. The vehicle begins its yaw to the left. That causes the rifle to rotate clockwise and for some reason it discharges. It continues that rotation and it's pointed forward when it strikes the tree. It is - - I can tell you it is an impossibility that that rifle went off after the impact of the tree. That's just not going to happen.
>
> A couple of things that I noted about that - - I think there were two things that were most important. Number one, how does the rifle rotate to the right when the vehicle is yawing to the - - or rotating to the left. I mean that really is - - it really probably shouldn't happen physically.
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> As far as the discharge being attributed to a malfunction of the rifle, I can't speak to that. I didn't get to see the rifle and from what I understand, the rifle - - last I heard or understood from the police reports, they still have that in custody and I don't think that there's been any testing on it to determine whether or not there's a trigger malfunction or. . .[23]

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[22] A right-hand yaw is when the rear of a vehicle moves to the right while the front is moving to the left in a left-hand turn. (*Id*. at 19).

[23] *Id.* at 27-30.

Mr. McKinzie noted the rifle would have been moving at 31 to 34 miles per hour – the same speed as the Jeep – until the barrel embedded itself in the dashboard.

Jay Pfeiffer, an accident reconstruction specialist, was retained by claimant's counsel to determine when the rifle discharged. He has worked in accident reconstruction since 1981 and has a Bachelor of Science in mechanical engineering. Prior to this case, Mr. Pfeiffer had never evaluated how a rifle discharging might impact a motor vehicle accident, but he stated bullet trajectories involve "typical physics problems" that he has encountered "many times" and he has experience analyzing firearm discharge situations.[24]

For review, Mr. Pfeiffer was provided with the accident report, photographs, Deputy Williams' deposition transcript, Mr. McKinzie's report and a Remington Model 700 rifle. Mr. Pfeiffer did not go to the accident scene. Trevor's Jeep was no longer available, so he used a 1998 Jeep Grand Cherokee, with the same overall body and dimensions as Trevor's 1996 model, including 58" of shoulder width in the front passenger area.[25] He viewed photographs to determine the trajectory of the bullet. He built a jig showing the angle corresponding to the entrance and exit holes in the driver side door. Based on the trajectory of the bullet and the physical dimensions of the rifle, he concluded the rifle had been in the back seat in an unknown orientation and could not have been positioned laterally across the front seat at the time of discharge. Mr. Pfeiffer's report stated:

> The only conclusion concerning the rifle orientation consistent with the bullet trajectory, the geometric constrains of the vehicle interior and the rifle dimensions is that the rifle was being transported behind the front seats. During the collision with the tree the Jeep was steering left and yawing with its front end going left in a counter-clockwise rotation. When the Jeep struck the tree, the rifle was caused to move towards the front of the Jeep. As the rifle came forward it impacted the passenger seat back and began to rotate through the opening between the two front seats. During this movement the chambered rifle discharged. After discharging the rifle continued to move through the opening between the two seats and ultimately the barrel of the rifle wedged into the dash of the Jeep as the Jeep slowed and the rifle continued through the seat opening.
>
> Remington model 700 rifles have a history of misfire incidents. It would not be unexpected that a chambered rifle may fire while being jostled in a wreck but with the misfire history of this model rifle it is certainly possible and expected that the discharge of the rifle was a result of the collision and not a result of accidental discharge by a person.

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[24] Pfeiffer Depo. at 8-9.

[25] Body dimensions of 1993-98 Jeep Grand Cherokees are the same. (McKinzie Depo. Ex. 3 (4N6XPRT StifCalcs - Selected Vehicle_ 1996 Jeep Grand Cherokee).

> The rifle could not have been being transported in the front seat when the collision occurred. The only explanation consistent with the facts is that the rifle was being transported behind the front seats and that the collision with the tree caused the rifle to move forward and that during this forward movement that the rifle misfired.
>
> Individuals often lose control of their vehicles without a precipitating emergency event; the loss of control becomes the emergency event. For whatever reason, the driver lost control of the vehicle, ran off the road and collided with the tree. The discharge of the rifle occurred as a result of the collision with the tree.[26]

Mr. Pfeiffer testified that as a result of the collision, any unrestrained objects in the vehicle, including the rifle, would have moved forward at the same speed the vehicle was traveling just before hitting the tree. He testified the rifle would not have moved forward until the Jeep struck the tree. Had the rifle been in the front of claimant or carried laterally by claimant when the collision with the tree occurred, the rifle should have been wedged between claimant and the dash after the wreck. He agreed the butt of the rifle was higher than the barrel when the rifle discharged, at approximately a 30° angle off perpendicular.

The following dialogue occurred during Mr. Pfeiffer's deposition:

> Q. So if we were to imagine Nathan Smalley sitting in this front passenger's seat, in order for the rifle to be - - to match the trajectory, it would have to go through him and the seat back?
>
> A. That is correct. Through the - - possibly the left side of his torso or - - in that area. Again, the dowel - - it could be moved a little bit but not substantially.[27]

Mr. Pfeiffer reiterated the rifle had to have been transported behind the front seats of the Jeep:

> Q. Okay. Now, on page 10 I'm looking at the last paragraph on that in your report, you've written: The only conclusion concerning the rifle orientation consistent with the bullet trajectory, the geometric constraints of the vehicle interior, and the rifle dimensions is that the rifle was being transported behind the front seats. Can you explain to me why that is.
>
> A. Yes. And part of it was what I described earlier, that because we know that the gun is angled forward and across the vehicle, while the passenger is moving forward to the dash, because he was found wedged between the seatback and the dash, the gun would have had to have moved out from in front of him over to the left and then the butt would have to gone backwards, because we can see in Sheriff's Office Photograph 11 that the butt is

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[26] Pfeiffer Depo., Ex. 2 at 10-11.

[27] *Id*. at 23.

towards the side of the seat and back, the gun would have had - - and we know that the barrel is embedded into the dash, so it would have been further - - even further back, so that the gun would have had to move laterally, the butt would have had to gone rearward, the whole rifle is rearward and then into the dash in order to reach that alignment. So that's one inconsistency.

What is consistent, though, is if the rifle is somewhere in the back seat area or back cargo area, depending upon how the seats were configured, that during the collision - - and I guess I'll stand up and try to illustrate this. If the rifle were (indicating) - - and if my chair were the driver's - - I'm sorry - - the passenger's seat, if the rifle were back behind the seat somehow, at some orientation and at some angle, during the collision, if it came forward and impacted the seat, it could rotate and as it's doing that discharge and then continue rotating through the - - between the seats and impact the dash itself.

Q. Okay. So it's your opinion that throughout - - once the Jeep struck the tree, the rifle rotated in what essentially I guess would be a clockwise fashion?

A. Well, it's - - relative of the car, there's - - I don't know the exact orientation of the rifle in the back seat or the cargo area, but in order for it to come through the dash it is certainly consistent with it striking the rear seat at an angle, discharging, and continuing that rotation. And, in addition, the vehicle is rotating at the same time, so that - - that rotation is consistent with, as the gun moves forward, the vehicle is rotating counterclockwise, and that increases the likelihood of - - it's consistent with the rotation that is occurring as opposed to counter to the rotation that is occurring. So it's - - both of them acting together, one, the rifle moving forward, the rotation of the vehicle, and the impact of the gun against the left rear corner of the seat are all consistent with the vehicle and rifle motion consistent with this bullet trajectory.

Q. If I understand one of the things you're saying, you're indicating that the Jeep itself, as you indicated earlier, was turning counterclockwise?

A. Yes. The vehicle is - - is coming off the road, and - - and in a leftward steer but also it's yawing to the left, and it collides at the right front corner. When it - - when that collision occurs, that also increases the counterclockwise rotation.

Q. Okay. And when you say counterclockwise rotation, you're talking about the rear of the vehicle moving faster than the front of the vehicle which struck the - - struck the tree, is that right?

A. During the collision the - - the front end stops and the rear end would move out to the right so that looking down it would have a counterclockwise rotation.

> Q. And at the same time the rifle within the vehicle is turning in the opposite direction?
>
> A. It's moving forward, but it - - it - - as it strikes the seat back, it could move in the opposite rotation and together they would combine to produce the net trajectory.
>
> Again, I don't know the exact orientation of the gun in the back seat or cargo area, but certainly it is consistent - - the dynamics are consistent with it being carried back there and these rotations producing that alignment.[28]

Based upon the damage to the vehicle, Mr. Pfeiffer believed the vehicle was traveling at a higher rate of speed than 31-34 miles per hour at the time of impact. He testified the discharge happened during the collision event with the tree itself:

> [T]he gun doesn't come forward, shoot, and then rotate. It is rotating continuously as a result of this collision. It doesn't rotate - - since it is about 90 degrees off perpen – or I'm sorry, 30 degrees off perpendicular, along a trajectory, then the rotation to get perpendicular to the dash would be another 60 degrees, and the pictures show it's not perpendicular to the dash, so it would be less than 60 degrees rotation after discharge along the path, but it is all one motion. The collision causes the gun to move forward, it - - it impacts the seat, there's a discharge, and it continues its rotation as the vehicle also rotates and ultimately is found in the dash.
> . . .
>
> And as I've said more than once, the exact orientation of the gun in the back seat, I do not know, but this gun could have been in the back seat and rotated with the barrel coming forward, the vehicle is also rotating, and the end of the barrel has to come between the seats, and as the barrel - - the barrel hitting the seat would give it a rotation point, and then it would discharge and go through the - - and continue on up to the dash.[29]

Mr. Pfeiffer could not say whether there was evidence Trevor tried to apply the brakes or took evasive maneuvers to avoid the accident.

Relevant to respondent's appeal, the underlying Award had numerous conclusions:

- Trevor's speeding caused the motor vehicle accident and the prevailing factor in claimant's death was the accidental motor vehicle crash;
- the rifle was either laying in the back seat or on the floor board;

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[28] *Id*. at 27-30.

[29] *Id.* at 49-50.

- the speed of the Jeep and its sudden stop due to hitting the tree caused the rifle to move abruptly from the back seat area;

- "[m]ore likely than not, the crash caused the rifle to misfire"[30] on a downward angle from the back seat area, which resulted in Trevor being shot;

- "substantial movement" of the rifle from the back of the Jeep caused the rifle barrel to become embedded in the dash after the crash;[31]

- the rifle shot was not directly responsible for claimant's death;

- the accidental rifle firing was not a neutral risk or a personal risk, but rather a known risk and was placed in the vehicle by Trevor, who was entrusted by respondent to get claimant to the work site;

- a driller transporting his crew to the drill site was part of the conditions of employment and having the driller and crew arrive and depart the job site together benefitted respondent, as was the case in *Quintana.*[32] Following such case, the judge concluded K.S.A. 2011 Supp. 44-508(f)(3)(B) did not preclude compensability.

Respondent filed a timely appeal.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.[33] It is claimant's burden to prove his or her right to an award based on the whole record under a "more probably true than not true" standard.[34] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[35] Both the arising "out of" and "in the course of" employment conditions must be proven to allow compensation. Such phrases have separate and distinct meanings:

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[30] Award at 5-6.

[31] *Id.* at 5.

[32] *Quintana v. H.D. Drilling, LLC*, No. 106,126, 2012 WL 1759430 (Kansas Court of Appeals unpublished opinion filed May 11, 2012).

[33] K.S.A. 2011 Supp. 44-501b.

[34] *Id.* and K.S.A. 2011 Supp. 44-508(g).

[35] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[36]

K.S.A. 2011 Supp. 44-508 states, in relevant part:

(f)(2)(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

. . .

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

(B) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

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[36] *Id.*

. . .

> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.
>
> (h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

Kansas case law recognizes three types of risks:[37] (1) employment risks associated with the job; (2) personal risks associated with the employee, such as a bad knee or a bad back;[38] and (3) neutral risks not associated with the employer or the employee.[39] A sniper attack is a neutral risk.[40] An unexplained fall is a neutral risk.[41] "D]octors use the term idiopathic to refer to something for which the cause is unknown."[42] Interestingly, appellate decisions have also indicated the terms "personal" and "idiopathic" are the same thing.[43]

According to case law, the "going and coming" rule is not applicable where travel is a necessary and integral part of the employment.[44] Employees traveling to fixed job sites are generally not covered and "when determining whether a given daily commute is within the scope of the Act, an increased risk to the employee or an increased utility to the employer is a useful indicator of whether the inherent travel exception should apply."[45]

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[37] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979).

[38] See *Johnson v. Johnson County*, 36 Kan. App.2d 786, 147 P.3d 1091, *rev. denied* 281 Kan. 1378 (2006); *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 299–300, 615 P.2d 168 (1980).

[39] *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 92, 200 P.3d 479 (2009).

[40] *Hensley*, 226 Kan. at 258.

[41] See *McCready*, 41 Kan. App. 2d at 92.

[42] *Kuxhausen v. Tillman Partners, L.P.*, 40 Kan. App. 2d 930, 935, 197 P.3d 859 (2008) *aff'd*, 291 Kan. 314, 241 P.3d 75 (2010).

[43] See *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 11, 61 P.3d 81 (2002).

[44] See *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973); see also *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan.1042 (1984).

[45] *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 546, 18 P.3d 278 (2001), *rev. denied* 271 Kan. 1035 (2001) ("[C]ase law recognizes a distinction between accidents incurred during the normal going and coming from a regular permanent work location and accidents incurred during going and coming in an employment in which the going and coming is an incident of the employment itself."); see also *Kennedy v. Hull & Dillon Packing Co.*, 130 Kan. 191, 285 P. 536 (1930).

K.S.A. 2011 Supp. 44-551(i)(1) provides in part:

> On any such review [of an award], the board shall have authority to grant or refuse compensation, or to increase or diminish any award for compensation or to remand any matter to the administrative law judge for further proceedings.

K.S.A. 2011 Supp. 44-555c(a) provides in part:

> The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

ANALYSIS

Claimant's accidental death arose out of and in the course of his employment.

For the reasons set forth below, the Board finds claimant's accidental death arose out of and in the course of his employment.

A. Compensability is not barred by the going and coming rule.

Where travel is integral to a claimant's employment, such claimant's accidental injuries sustained during travel are generally compensable. This rule has been applied to a number of factual scenarios demonstrating what is and is not compensable.

In *Mitchell,*[46] the claimant was a "tool pusher" and president of his company who traveled extensively between oil wells. He was on call 24 hours a day and had to respond to emergencies. Mitchell died in a car accident while traveling to supervise the commencement of a well. He was using a company car loaded with drilling equipment. The *Mitchell* decision states:

> The accident also arose out of his employment. A necessary part of his employment consisted in traveling from well to well and to any other place at which he might desire to transact business pertaining to drilling activities. Manifestly, part of his business consisted of traveling the highways. The hazards and risks of highway travel were incidents of his employment. It was in connection with those hazards of employment that his death occurred and it cannot be said the accident did not arise out of his employment.[47]

[46] *Mitchell v. Mitchell Drilling Co.*, 154 Kan. 117, 114 P.2d 841 (1941).

[47] *Id.* at 122.

In *Blair*,[48] mechanics died in a motor vehicle accident while driving home after an examination their employer expected them to take. There was no understanding the workers were to be paid for such trip. The Kansas Supreme Court concluded the employees were in the course and scope of their work because the trip was integral, incidental to and part of the mechanics' employment. The Court further noted such trip included "the normal traffic hazards inherent in such an undertaking."[49]

In *LaRue,*[50] after drilling an oil well, LaRue and a driller decided to leave where they had been staying for work and go to their homes over 100 miles away. The driller's automobile crashed into a tree and LaRue died. LaRue was not furnished transportation as part of his employment and the driller was not authorized to provide transportation for LaRue. LaRue was not working or under the employer's control at the time of the accident. There was substantial evidence supporting the trial court's denial of benefits because LaRue's trip home was a "purely . . . personal mission."[51]

Possession of work paraphernalia was noted in *Newman* to be a factor in determining compensability, but did not convert a trip into being part of the employment.[52] Newman died in a motor vehicle accident while traveling between different sites. He used a pickup truck to haul tools, equipment and supplies to service wells, and he was available when needed. His travel to and from well sites was not "purely personal to him – he was required to have certain equipment and supplies with him and available while on duty and also to have a mode of rapid transportation. Clearly travel on the public highway was regarded by all as a part of his work."[53]

Messenger[54] concerns a fatal motor vehicle accident while a claimant was traveling home from a remote drill site. Messenger had no permanent work site. His employer sought employees willing to work at "mobile" drill sites and reimbursed their travel. It was industry practice for drillers to live away from drill sites and travel daily. The Court found claimant's travel home from the drill site was an intrinsic, integral and necessary part of his work and found the accident compensable as an exception to the "going and coming" rule:

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[48] *Blair v. Shaw*, 171 Kan. 524, 233 P.2d 731 (1951).

[49] *Id.* at 529.

[50] *LaRue v. Sierra Petroleum Co.*, 183 Kan. 153, 325 P.2d 59 (1958).

[51] *Id.* at 157.

[52] *Newman v. Bennett*, 212 Kan. 562, 568, 569, 512 P.2d 497 (1973).

[53] *Id.*; see also *Bell v. A. D. Allison Drilling Co., Inc.*, 175 Kan. 441, 264 P.2d 1069 (1953), *r'hg denied* Jan. 26, 1954 (compensation awarded when oil driller died in a car crash while trying to assemble a crew).

[54] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556 (1984).

> Kansas has long recognized one very basic exception to the "going and coming" rule. That exception applies when the operation of a motor vehicle on the public roadways is an integral part of the employment or is inherent in the nature of the employment or is necessary to the employment, so that in his travels the employee was furthering the interests of his employer.[55]

Kindel[56] addresses a traveling employee who sustained a fatal accidental injury while riding in a supervisor's company truck. Kindel and his supervisor became inebriated at a "striptease" bar after work. When resuming their route home, claimant was killed when the supervisor wrecked the truck. The Kansas Supreme Court noted there was substantial evidence to support compensability:

> . . . Kindel was a passenger and not the driver. He was being transported home after completion of his duties. Despite approximately four hours at the [bar], the distance of the deviation was less than one quarter of a mile. Kindel was killed after resuming the route home. Under the facts, even though the worker was intoxicated, as a passenger in his employer's vehicle, he was not committing a violation of Kansas law. Kindel was killed while engaging in an activity contemplated by his employer while traveling on a public interstate highway. The fact he had been drinking has no legal bearing on the present compensation determination since there was no proof that the accident or Kindel's death resulted from Kindel's intoxication.[57]

In *Halford*,[58] a water and sewer foreman drove a specially equipped truck that could refuel heavy equipment. He was driving to pick up a worker, Benson, before intending to go to the respondent's "yard" to pick up supplies. Halford died in an accident while en route to Benson's home. While Halford was not paid for his travel, he had to travel great distances from his home to various job sites. The Court concluded "use of a company vehicle, specially equipped for the work to be performed, is an appropriate factor to be considered in determining whether travel in that vehicle is an intrinsic part of the employment . . . ."[59] The Court noted Halford was a supervisor and had transportation in a company vehicle. The Court observed Halford did not deviate from his employment or engage in a personal side-trip. Further, the Court concluded travel was an intrinsic part of Halford's work because he was on a special work-related errand to respondent's "yard" at the time of the accident.

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[55] *Id.* at 437.

[56] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[57] *Id.* at 284.

[58] *Halford v. Nowak Constr. Co.*, 39 Kan. App. 2d 935, 186 P.3d 206, *rev. denied* 297 Kan. 765 (2008).

[59] *Id.* at 940.

A negligence case, *Scott*,[60] discusses the fellow servant rule. Hughes, a driller, was paid mileage expenses. The crew members were paid $15 "ride time" for sites more than 100 miles away. Hourly pay began at the job site. The *Scott* case noted there was no hard and fast rule that traveling oil field workers are categorically covered under workers compensation for travel injuries, but noted the Kansas Court of Appeals provided some encouragement in that direction.[61] Instead, the Kansas Supreme Court looked at consistent patterns from prior going and coming cases:

> Payment of mileage was critical to the outcome in *Messenger*, for example, and so was the absence of a permanent work site and the practical necessity of daily travel from home to perform job duties. The benefit of the worker's travel to the employer was mentioned explicitly in *Messenger* and repeatedly alluded to in *Mitchell*. In *Bell*, the travel inherent in the responsibility for assembly of a crew for a drilling site was persuasive. Our *Newman* case relied on the nature of the vehicle–a pickup truck loaded with tools, equipment, and supplies–as well as recognition that the pumper's duties were not confined to a single work site. In contrast, in *LaRue*, the subject derrick man was on a "'personal mission having no connection with his employment'" at the time he suffered his fatal injury. 183 Kan. at 157, 325 P.2d 59. He was not "'moving to another location at the request of his employer, but rather was going home after leaving the duties of his employment.'" 183 Kan. at 157, 325 P.2d 59. In other words, the travel in which the derrick man was engaged at the time of the accident offered no benefit to his employer.
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> . . .
>
> . . . Although plaintiffs were certainly able to point to some evidence that the passengers in Hughes' vehicle were not in the course and scope of their employment at the time of the accident – they were, after all, uniformly asleep and were not being paid for their ride time – they could not do likewise for Hughes himself.
>
> However Hughes may have characterized the "carpool" in his deposition, at the time of the accident, he had gathered the crew he was responsible for having assembled and ready to work 90 miles from home by 6:45 a.m. He was getting paid for his mileage, Duke Drilling's explicit recognition that his driving was of benefit to its enterprise. Hughes' work site was changeable, and Hughes' ability to adapt and appear with his crew as ordered was part of what Duke Drilling was paying his wages for. Hughes was not on a personal mission at the time of the accident. Indeed, according to all of the witnesses, he was performing an informal but customary duty in his and Duke Drilling's industry.
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> . . .

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[60] *Scott v. Hughes*, 294 Kan. 403, 275 P.3d 890 (2012).

[61] *Id.* at 420.

> The evidence in this case could only show that the travel . . . was an intrinsic part of Hughes' job. The going and coming rule under K.S.A. 44-508(f) thus did not apply, and Hughes was within the course and scope of his employment.[62]

In *Craig,*[63] a driller who typically traveled to different job sites was injured driving home in his own vehicle after temporarily working in a shop. The going and coming rule did not apply because: (1) respondent continued to reimburse Craig for his travel despite the change in work site; (2) Craig had no permanent work site; (3) Craig continued to transport at least one member of his crew to and from the shop; and (4) respondent and Craig received a mutual benefit from the continued transportation arrangement.

In another oil field worker case, *Quintana*,[64] employees were injured in a car accident while traveling home from a drilling site. The going and coming rule did not apply because it was concluded the employees were working from the time they got into the vehicle to travel to mobile drilling sites until they returned home. Benefits were awarded to both the driver, who was paid a mileage reimbursement, and the passengers, who were paid a per diem for work done at a job site, but who were not paid for travel.

Condensing these principles, the Board must consider, in no particular order of importance, various non-exhaustive factors, including:

- did claimant have a fixed work location or was he required to travel to changing work sites;
- was claimant paid, reimbursed or compensated to travel;
- was claimant's travel part of a special errand for respondent, being on call or responding to an emergency;
- was claimant using a company vehicle, or a vehicle that is either specially equipped for work or transporting work implements or work paraphernalia;
- was claimant's travel personal or deviated from a work purpose; and
- was claimant's travel necessary and integral to claimant's work or furthers respondent's interest versus merely commuting to and from work.

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[62] *Id.* at 420-22. *Scott* also shows the Kansas Supreme Court is still calling the inherent travel exception to the statutory going and coming rule an exception. *Scott*, 294 Kan. at 414. Compare to *Halford v. Nowak Const. Co.*, 39 Kan. App. 2d 935, 942, 186 P.3d 206 (2008) (Leben, J., concurring) ("I merely wish to add that the exception to the going-and-coming rule for travel that is intrinsic to the job is firmly rooted in the statutory language, even though many cases have referred to it as a judicially created exception.").

[63] *Craig v. Val Energy, Inc.*, 47 Kan. App. 2d 164, 171, 274 P.3d 650 (2012), *rev. denied* 297 Kan. __ (May 20, 2013).

[64] *Quintana v. H. D. Drilling, LLC*, Nos. 106,126, 106,127 & 106,131, 2012 WL 1759430 (Kansas Court of Appeals unpublished decision filed May 11, 2012).

The facts in this case are similar to *Messenger*, *Scott*, *Craig* and *Quintana*, in which workers had mobile and changing work locations, i.e., not fixed or permanent work sites. Travel was inherent and integral to their jobs. Unlike the workers in *Messenger*, *Scott* and *Craig*, claimant was not paid for his mileage. While *Scott* notes this factor was "critical" in *Messenger*, *Quintana* noted hourly or mileage pay for passenger workers is not necessary for compensability.[65] Payment for travel was not required for compensability in *Halford*.

Claimant was not on a special errand for respondent, on call or responding to an emergency. Trevor's Jeep was not a company vehicle and he was not hauling work equipment. However, the risk of highway travel would be the same for both driver and passenger. As part of his work, claimant was expected to travel with his supervisor, Trevor, which is akin to an employer-provided travel arrangement.

There is no evidence claimant's travel was personal, as in *LaRue*, or that a deviation from a work purpose occurred. Instead, the evidence shows Trevor's transporting claimant to the work site provided increased utility or benefit to respondent of having the driller-supervisor round up the same crew to show up and leave work simultaneously. Such factor helps establish claimant was already working when traveling to Rig 5 on December 3, 2011, at least based on similarities to *Quintana*. The claimant was going to work, but he had already assumed his duties. K.S.A. 2011 Supp. 44-508(f)(3)(B) does not bar claimant's accidental injury from arising out of and in the course of his employment.[66]

B. The Board will not address whether claimant's death arose either directly or indirectly from idiopathic causes because such issue was never presented to the judge.

At oral argument, respondent asserted claimant's death was not compensable based on K.S.A. 2011 Supp. 44-508(f)(3)(A)(iv), which states an accident or injury which arose either directly or indirectly from idiopathic causes shall not be construed to have arisen out of and in the course of employment. Respondent acknowledged this specific issue was not argued to the judge. Rather, respondent's specific arguments to the judge were that claimant's accidental death did not arise out of and in the course of his employment as either due to a neutral or personal risk. Consequently, the judge did not address respondent's argument regarding an idiopathic accident or injury.

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[65] The Board is aware such workers in *Quintana* received a per diem for work done at job sites.

[66] The parties argue whether the proximate cause of claimant's injuries while on the way to assume employment duties was the employer's negligence. The judge did not rule on such issue. The Board is generally supposed to address issues heard and decided by the judge, not issues raised for the first time on appeal. See K.S.A 2011 Supp. 44-555c.

The particular issue regarding claimant's accident or injury being idiopathic in nature was not briefed to the Board. At oral argument, claimant objected to respondent raising such argument for the first time on appeal. K.S.A 2011 Supp. 44-555c mandates the Board's consideration be on issues presented to the judge. Respondent's "idiopathic cause" argument was not raised to the judge. The Board will not hear such issue for the first time on appeal.[67]

C. Claimant's accident and death were not caused by personal risk or a neutral risk with no particular employment character.

As an initial matter, an idiopathic cause is described as emanating from an unknown cause,[68] while a neutral risk is described as one that is unexplained.[69] The terms "neutral" and "idiopathic" may overlap,[70] but we suspect the legislature was not superfluous in prohibiting both compensation for accidents or injuries that are due to neutral risks and those directly or indirectly caused by idiopathic causes.

At oral argument, respondent theorized claimant reached behind his seat with his left arm, grabbed the rifle, and in the process of bringing the rifle toward the front of the Jeep, claimant accidentally shot his brother in the leg. Respondent asserts claimant died because Trevor drove off the road after being shot in the leg. Respondent argues the accident and claimant's death were the result of the rifle discharging, which it terms a personal risk or a neutral risk. Respondent contends Mr. Pfeiffer's opinion that the rifle discharged after the Jeep's collision with the tree is too incredible to believe. Respondent further notes Mr. Pfeiffer failed to account for the "kick back" that would have occurred after the rifle discharged, but no evidence was presented regarding the impact of rifle "kick back."

Claimant argues the cause of his accidental injury is simple: he was injured when his supervisor drove his Jeep off the road and collided with a tree. Claimant notes the motor vehicle accident could have been caused by various reasons, such as the driver speeding, failing to maintain a proper lookout, avoiding a deer in the road, changing the radio station, lighting a cigarette, and so forth. Claimant also asserts the reason the rifle discharged is irrelevant, but postulates the rifle misfired due to the collision with the tree, such that Trevor was shot in the leg after the Jeep struck the tree.

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[67] See *Hunn v. Montgomery Ward*, No. 104,523, 2011 WL 2555689 (Kansas Court of Appeals unpublished opinion filed June 24, 2011).

[68] Following *Kuxhausen*, supra.

[69] Following *McCready*, supra.

[70] See *Roget's 21st Century Thesaurus* 842 (2d Ed. 1999).

There is little *certainty* in what actually occurred, but the standard is based on a *preponderance* of the evidence. We do not know the exact position of the rifle prior to its discharge and the true path of the bullet likely changed after it struck Trevor's femur. However, the whole record suggests, more likely than not, that the rifle was in the backseat or back floor board area prior to discharge. It is unlikely the 44½" rifle, prior to the collision with the tree, was in a position where it would be lined up to shoot Trevor in the leg at a downward angle, with the butt of the gun near or behind what should be the front passenger seat headrest.[71] There is no credible evidence claimant was holding the rifle prior to it firing. Had the rifle been in the front seat area, its final position likely would have been laterally across the seat, between one or both Smalley brothers and the front dash, still pointing at Trevor, but that did not happen. The Board concludes the rifle was probably in the back seat before the collision with the tree and the collision propelled it forward and likely caused it to fire. We do not think the rifle barrel would have ended up speared about six inches into the front dash with the rifle butt wedged against the front seat had it been in the front seat area or was being handled by either Smalley brother.

While there is much that we do not know, one inescapable conclusion is that claimant died from injuries sustained when his supervisor wrecked his Jeep into a tree. Such event is not a personal risk or a neutral risk. Similarly, how fast the Jeep was traveling is relevant to analyzing the accident and potential causes. However, no matter the actual speed, the Jeep was traveling fast enough to be demolished, seriously injure Trevor and injure claimant severely enough to eventually kill him.

Claimant's accident or injury did not arise out of a neutral risk with no particular employment or personal character. The facts of this case do not correspond well with personal risk cases that involve preexisting physical conditions. Even if we viewed the loaded rifle as a personal risk, the rifle did not belong to claimant. Claimant did not personally produce the rifle as a danger and there is no evidence claimant even knew he was traveling in a vehicle containing a loaded weapon. As noted above in discussion concerning the going and coming rule, claimant's travel was inherent to his employment, such that it was not a neutral risk, but was a risk associated with employment.

D. Was there a causal connection between claimant's accidental injury and the conditions under which work was required to be performed?

Respondent argues claimant's injury by accident did not arise out of employment because there was no causal connection between the conditions under which the work was required to be performed and the accident. Specifically, respondent argues there was no work requirement for a loaded weapon to be in the Jeep. This argument presupposes the rifle discharged and caused the accident. The Board will not make that conclusion. We do not know exactly what caused the accident, other than Trevor driving off the road.

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[71] Pictures of the Jeep show the absence of a passenger side headrest.

Claimant was required to ride to work with his supervisor. The Board is duty-bound to follow appellate precedent establishing that travel itself is an incident of work for oil field workers that travel to drill sites. Thus, there was a causal connection between claimant's injury and the conditions under which the work was required to be performed.

Respondent also argues *Squires*,[72] a case involving an injured police officer, is controlling. In such case, the Board found:

> Claimant was injured on January 3, 1990, while doing traffic surveillance as a part of his duties as a police officer for Emporia State University. The injury resulted from accidental discharge of a 9 millimeter automatic pistol. The pistol was a personal weapon which claimant had retrieved from a pawn shop earlier that day. The weapon discharged as he checked the pistol to determine whether it needed to be cleaned. The evidence establishes that claimant was not authorized to carry a backup weapon. The evidence further establishes that he had requested permission to qualify his 9 millimeter pistol for use in his employment, but the request was denied. Claimant acknowledges in his testimony that the handling of his personal 9 millimeter handgun was not related to the performance of his duties for respondent. The Appeals Board concludes the discharge of the weapon resulted from purely personal activity, was not work related and benefits should, accordingly, be denied.[73]

The Kansas Court of Appeals affirmed, noting Squires had the gun with him for personal reasons, he knew he was forbidden to have a backup weapon and his possession of the handgun had nothing to do with his ultimate work.[74]

Squires is distinguishable. Squires was injured performing a prohibited personal activity during work. His request to possess the weapon at work was denied. In this case, there is no proof *claimant* was performing a prohibited personal activity while riding to work with his supervisor, an activity the employer contemplated and which benefitted respondent. While there is an argument Trevor should not have had the gun at the job site, he was only told he "should not" have the gun at the job site and the Smalley brothers were not at a job site when the gun fired.

The Board sees no reason to deviate from the numerous "inherent travel" cases cited above. Following such cases, claimant was already in the scope and course of his employment when he was traveling with his supervisor to the job site.

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[72] *Squires v. Emporia State Univ.*, 23 Kan. App. 2d 325, 929 P.2d 814 (1997).

[73] *Id.* at 325-26.

[74] *Id.* at 326-27.

E. Claimant's accident was the prevailing factor in causing his injury, medical condition and disability.

The prevailing cause of claimant's injury, medical condition and disability, i.e., death, was his supervisor accidentally striking the tree with his Jeep, not the rifle discharge.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board affirms the Award.

AWARD

WHEREFORE, the Board affirms the January 28, 2014 Award.

IT IS SO ORDERED.

Dated this _____ day of May 2014.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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